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IN THE

Supreme Court of the United States

OCTOBER TERM, 1948

No. 390

HENRY M. PROPPER, as Receiver of the property and assets within the State of New York of AKM;

Petitioner,

—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian,

Respondent.

PETITION FOR REHEARING

A. WALTER SOCOLOW,
Counsel for Petitioner.

JOSEPH M. COHEN,
On the Brief.

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—against—

TOM C. CLARK, Attorney General as Successor to the Alien Property Custodian,

Respondent.

PETITION FOR REHEARING

To the Honorable, the Justices of the Supreme Court of the United States:

Petitioner herein, HENRY M. PROPPER, as Receiver, etc., respectfully prays this Court to grant a rehearing of this cause, for the reasons hereinafter stated, and upon such rehearing, to reverse the judgment below.

We believe that the majority opinion overturns two basic doctrines long maintained in this Court. The opinion does not portend this result expressly. However, it follows inevitably from the plain implications of the opinion. It is for this reason that we earnestly ask this Court to re-appraise its decision.

I.

The decision here changes the constitutional basis of *in rem* jurisdiction; in effect, it overrules *Pennoyer* v. *Neff*.

Since 1878 (*Pennoyer* v. *Neff*, 95 U. S. 714), this Court has held, consistently, that a state may adjudicate against a non-resident—not personally served in the state—to the extent that he has property in the state. This is constitutionally possible (under the 14th Amend.) if the property proceeded against is "brought under the control of the Court by seizure or some equivalent act" at the commencement of the action. *Pennoyer* v. *Neff*, 95 U. S. 714, 727.

The majority opinion in the instant case (p. 15) professes to follow this rule here. The Court assumes that, under New York law, AKM's property was "brought under the control of the Court" by the mere appointment of the temporary receiver. Therefore, it concludes that the requisite of *in rem* jurisdiction is satisfied here. If the assumption is valid, the decision does not diverge from *Pennoyer* v. *Neff*, *supra*. On the other hand, if the mere appointment of Petitioner as temporary receiver did not—under New York law—bring AKM's property under the control of the Court, this Court has here sanctioned a departure from *Pennoyer* v. *Neff*.

Under §977-b of the New York Civil Practice Act the property of the defunct foreign corporation is dealt with in two phases. In the first, a method is supplied for taking jurisdiction of *all* of the defunct foreign corporation's local assets. This is done by vesting the receiver—while temporary—with title to all such assets. In his temporary capacity, the receiver is the equivalent of the sheriff. His

appointment is meant to effect an attachment of all the assets. The second phase is that of distributing all of the assets after judgment. This is done by the receiver in his permanent capacity.

The entry of the order appointing Petitioner temporary receiver was comparable to the issuance of a warrant to the sheriff to attach the defendant's property. The warrant of attachment—even if placed with the sheriff—brings nothing under the control of the Court. Only when the warrant of attachment is executed by a levy has there been the seizure (or equivalent) required by *Pennoyer v. Neff*. *Robinson* v. *Columbia Spinning Co.*, 23 N. Y. App. Div. 499, 502; *Rodgers* v. *Bonner*, 45 N. Y. 379; *Cooper* v. *Reynolds*, 10 Wall. 308, 319; *New York Civil Practice Act* §916.

The mere appointment of Petitioner as temporary receiver under §977-b with the direction to him to take and hold all the assets of AKM was the equivalent—and nothing more—of the issuance of the warrant of attachment to the sheriff. The sheriff, equally with the temporary §977-b receiver, acts as the officer of the Court. *Stojowski* v. *Banque De France*, 294 N. Y. 135, 145. The warrant of attachment, equally with the order appointing the temporary receiver, is a direction and authorization to take the defendant's property for purposes of *in rem* jurisdiction.

If the direction to the sheriff to take the defendant's property, embodied in the warrant, does not, alone, effect its seizure (or the equivalent), then the mere appointment of the temporary §977-b receiver does not—without more—effect a seizure. In neither case is the defendant's property brought under the control of the Court. In neither is this essential jurisdictional requisite—indispensable under *Pennoyer* v. *Neff*—present. In both cases, some-

thing more is required. In case of attachment, the seizure is perfected when, and only when, the warrant is levied. *N. Y. Civil Practice Act* §916. In the case of §977-b, the property of the defunct foreign corporation is brought under the control of the Court only because the appointment of the temporary §977-b receiver is complemented by subd. 19 of §977-b which vests all of such property in the temporary receiver "upon the making of the order appointing him."

It is true, as the majority opinion states, that a seizure of title is not essential under *Pennoyer* v. *Neff*. The seizure may be by attachment, injunction, garnishment, etc. But it is equally true—under New York law—that the mere appointment of a receiver is no seizure at all unless accompanied by attachment, injunction, garnishment, etc. Without some process against the foreign corporation's property, whether by attachment, garnishment, or, as here, by vesting the temporary receiver with title, the mere appointment of a receiver in an *in rem* proceeding brings nothing under the control of the Court. The New York State Court of Appeals has so held. *Matthews* v. *Matthews*, 247 N. Y. 32, 34, 35; *Issaia* v. *Russo-Asiatic Bank*, 266 N. Y. 37, 43.

The New York Legislature might have provided, in §977-b, for less than a seizure of title to accompany the appointment of the receiver in order to bring the property under the control of the Court. It chose not to do so. Instead, it vested in the temporary receiver title to *all* of the defunct corporation's assets so that the seizure would be coextensive with the object of the action, namely, liquidation and distribution of *all* of such assets. In this, the N. Y. Legislature acted well within its power. The choice of whether the seizure shall be one of title or something less rests with the State. *Sanders* v. *Armour Fertilizer*,

Works, 292 U. S. 190, 208 (Cardozo, *J.*, dissenting); *Corn Exchange Bank v. Coler*, 280 U. S. 218; *Security Savings Bank v. California*, 263 U. S. 282.

Even if §977-b had specified attachment or garnishment —instead of the temporary receiver—as the seizure device, the seizure would be one of *title*. In New York, attachment and garnishment would both have entailed a seizure of AKM's *title* to the ASCAP debt.

In one state the seizure, whether by attachment, injunction, garnishment, receiver, etc., may merely involve a right to possession. In another, it may effect a change of title. This Court is bound, constitutionally, to give the state statute the force and effect which it has in the state. U. S. Constitution, Article 4, §1; 28 U. S. Code, §687; *American Surety Co. v. Baldwin*, 287 U. S. 156, 166.

Under the statutes of New York, an *in rem* seizure for jurisdictional purposes is a seizure of title. This is true, whether, on the one hand, the seizure is by attachment or garnishment, or, on the other, by the appointment of a receiver, as here. The New York attachment statutes provide that the levy of the warrant of attachment against a debt effects a "seizure of all the rights of the defendant in or to the said debt." *N. Y. Civil Practice Act*, §916, subd. 3 and 4. This is not merely a seizure of the right to possession; it is a seizure of all the defendant's rights. It is unquestionably a seizure of title. §977-b, subd. 19, in directing that title to all of the local assets vest in the temporary receiver upon the making of the order of his appointment, merely conformed the seizure features of that statute with those already existing in case of attachment or garnishment. §977-b, being an attachment statute, should have been construed in analogy with the New York attachment statutes not with the *dicta* of old chancery decisions which dealt—not with seizure for purposes of

in rem jurisdiction, but—only with the powers of temporary receivers under the traditional chancery practice. (Our main brief, p. 20.)

As we read the opinion, this Court accepts the view that the temporary §977-b receiver was the device—as in attachment or garnishment—for acquiring *in rem* jurisdiction. This being so, there is no basis for holding that the N. Y. Legislature intended to accomplish less by the attachment device of §977-b than by attachment or garnishment under other New York laws. The New York courts hold to the contrary. Since, in attachment in New York, the sheriff is vested with title, the same must be true of the temporary §977-b receiver. This follows not only because of the clear dictate of subd. 19 of §977-b, but also under the New York rule of statutory construction. *Matthews* v. *Matthews*, 240 N. Y. 28, 34.

If, as this Court holds, the appointment of the temporary §977-b receiver does not vest him with title but only a right to possession, we do not see how §977-b can square with *Pennoyer* v. *Neff* unless the temporary §977-b receiver actually succeeds in reducing all of AKM's assets to his possession prior to the judgment. Subd. 10 and 11 of §977-b make it mandatory that the final judgment rendered shall bind *all* of the property of the foreign corporation. Such a judgment would be utterly void, as to any assets not taken into possession by the temporary receiver prior to the judgment. It would be impossible, under the 14th Amendment, for the permanent receiver to distribute all of AKM's assets, if the temporary receiver took less. Read, as construed by this Court, §977-b would make it mandatory upon the Court to enter a judgment which, under *Pennoyer* v. *Neff*, would be constitutionally void to the extent of AKM's property not actually taken into possession by the temporary receiver. *Freeman* v. *Alder-*

son, 119 U. S. 185; *Heilbrunn, etc., v. Kellogg*, 253 App. Div. 753, *app. dism.* 279 N. Y. 273.

Since, under the law of New York, the mere appointment of the temporary receiver was not—without attachment or the equivalent—a seizure of AKM's property, the necessary effect of the holding here is that *in rem* jurisdiction may be validly acquired without a seizure or its equivalent. This is precisely contrary to the holding in *Pennoyer* v. *Neff*. The Bar can construe the opinion in no other way.

The opinion here injects a new element of uncertainty into §977-b. New York litigants must choose, at their peril, whether to ascribe to the appointment of the receiver the effect given to such appointment by this Court or that—wholly different—given to it by the New York Courts. It is true that, under the decisions of this Court, the holdings of the New York courts on issues of state law are controlling. *Hicklin* v. *Coney*, 290 U. S. 169, 172. However, no court or lawyer would have the temerity to disregard a contrary holding by this Court.

The effect of the decision here, in its impact upon existing law, is four-fold:

1. This Court has pre-empted the authority of the New York courts to determine the quality of the title taken by the temporary §977-b receiver;

2. This Court has found that the mere appointment of the temporary §977-b receiver was the equivalent of an attachment, contrary to the holdings of the highest court of the State of New York;

3. This Court has given to the attachment device of §977-b an effect precisely contrary to that of other attachment statutes of the State of New York; and

4. This Court has, in effect, overruled *Pennoyer* v. *Neff* by holding that *in rem* jurisdiction can be validly acquired under §977-b by a process which the Courts of the State of New York have held to be ineffective to achieve a seizure or its equivalent.

Since the decision here has such impact, not only on the law of New York, but also upon federal law (insofar as the latter turns on state law), we earnestly urge that the point of state law be first referred to the New York Courts for authoritative construction. Only thus can the federal rule here involved emerge freed of the doubt and conflict now existing. Petitioner will furnish such guaranties as this Court may require that, if the cause is referred to the State Court for determination of the point of state law, he will raise no other issues in the State Court.

II.

The decision here overrules the traditional rule of comity which forbids State and Federal courts each from taking jurisdiction of a *res* first brought under the control of the other.

For almost a hundred years it has been the settled rule of comity, formulated by this Court, that, "when a State Court and a Court of the United States may each take jurisdiction of a matter [involving a *res*], the tribunal whose jurisdiction first attaches holds it, to the exclusion of the other, until its duty is fully performed, and the

jurisdiction involved is exhausted." (*Kline* v. *Burke Construction Co.*, 260 U. S. 226, 231; *Freeman* v. *Howe*, 24 How. 450.) The rule is one of right. It arises from the necessity, in a Federal system such as ours, of avoiding unseemly conflicts between our independent state and federal tribunals. This Court has accepted a "long recognized duty * * * to give effect to such methods of procedure as shall serve to conciliate the distinct and independent tribunals of the States and of the Union, so that they may cooperate as harmonious members of a judicial system coextensive with the United States". (*U. S.* v. *Bank of New York & Trust Co.*, 296 U. S. 463, 477.)

The practical effect of the decision here is to deprive this rule of all of its vitality.

The Court holds here that the State Court effectively brought the ASCAP debt under its control by appointment of the temporary receiver. Under the rule of comity, the ASCAP debt was thereby "withdrawn from the jurisdiction of all other courts." The State Court alone was vested "with the power to hear and determine all controversies relating" to the ASCAP debt. (*Lion Bonding & S. Co.* v. *Karatz*, 262 U. S. 77, 88.)

Notwithstanding this, the decision here permits the District Court to direct ASCAP, which held the debt subject to order of the State Court, to pay it to the Custodian. The acknowledged prior control of the State Court is no control at all if the District Court may, at its pleasure, channel the *res* directly to its own designee. The rule of comity is founded on the reciprocal duty of state and federal courts—each to respect the prior jurisdiction of the other over a *res*. We cannot see how it can be said that the District Court accorded this respect to the State Court if it was free to order ASCAP to pay the debt to the Custodian, leaving the State Court's proceed-

ings and judgment wholly ineffectual. Such a holding can only be premised on the notion that Federal Courts are superior—not merely equal—to State Courts. Cf. *Lion Bonding & S. Co. v. Karatz*, 262 U. S. 77, 89, and *U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463, in which the rule of comity was enforced against the United States.

It is true, of course, that the District Court could have determined, as between claimants on distribution in the receivership proceeding who should take when the State Court was ready to direct distribution. Such an adjudication, *in personam*, of rights between claimants was open to the District Court only because it did not challenge the State Court's jurisdiction over the *res*. Such an *in personam* determination would be "subordinate to every right asserted and decreed" in the State Court and "effective only insofar as it establishes rights derived from them." (*U. S.* v. *Klein*, 303 U. S. 276, 282.) The State Court would continue capable of proceeding to a judgment binding the *res*, notwithstanding the *in personam* decree of the District Court. (*U. S. v. Bank of New York & Trust Co.*, 296 U. S. 463, 477.)

The State Court had asserted and decreed the right—established by §977-b—to liquidate the claim against ASCAP, to apply the proceeds to the expenses of administration and to distribute the balance to those ultimately entitled as claimants. The *res* seized by the State Court was in law appropriated to these ends. The adjudication of the District Court, by channeling the debt directly from ASCAP to the Custodian, contravened the declared right of the State Court to achieve these ends. To permit this is not merely to sanction the "determination[s] of rights to participate in *res* in the hands of state courts," as this

Court here holds.[1] It is to exclude the State Court from any authority over the *res*. The District Court judgment in practical effect terminated the State receivership proceedings.

The difficulty with the decision here is that it proceeds upon the assumption that the suit brought by the Custodian in the District Court was *in personam*. The fact is that the Custodian had made an *in rem* seizure of AKM's interest in the ASCAP debt under the Trading with the Enemy Act, and brought the action in the District Court to enforce that seizure. (Our reply brief, p. 13.) ASCAP was joined because it held the seized property. As to it, the proceeding was *in personam*. As to AKM, the proceeding in the District Court—as well as that in the State Court—was *in rem*. *Security Savings Bank* v. *California*, 263 U. S. 282, 287. Obviously, the receivership action and the proceeding in the District Court—both involving proceedings *in rem*—necessarily entailed a conflict. As stated by this Court in *U. S.* v. *Bank of New York & Trust Co.*, 463, 477:

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1 This case in no way involved the "determination of rights to participate in res" as this Court assumes. As we understand it, the phrase "determination of rights" as used heretofore has always meant only an adjudication *in personam* between claimants. The judgment in such case merely furnishes the basis for the claim (on distribution) later filed in the Court which has possession of the *res*. Here Petitioner and the Custodian were not rival "claimants." Rather, each asserted the right to the ASCAP debt for the purpose of administration among claimants. The judgment of the District Court in directing payment of the ASCAP debt to the Custodian, left nothing to be done in the State Court. The Custodian can and will take the gross amount of the ASCAP debt without the necessity for making claim upon the State Court and without deduction of administration expenses and taxes which were a charge against the debt while in State Court custody. The decision here permits precisely that which *Markham* v. *Allen*, 326 U. S. 490, 495, noted as being in conflict with the rule of comity.

> "If the two suits are in rem or quasi in rem, so that the court must have possession or control of the res in order to proceed with the cause and to grant the relief sought, the jurisdiction of one court must of necessity yield to that of the other."

Once the conflict is resolved by directing, as here, that ASCAP pay the debt to the Custodian, the State Court, though its jurisdiction first attached, no longer has "possession or control of the res" which is indispensable to enable it "to proceed with the cause and to grant the relief sought."

If, as here, a lower Federal Court may strip a State Court of a *res*, admittedly first acquired by the latter, we can perceive of no case in which the rule of comity between State and Federal Courts can have practical application. The rule of comity exists *in vacuo*—there is no area in which it may operate. We believe, in all sincerity, that the holding here—despite the language of the opinion—has doomed the rule of comity. The Bar cannot construe the result here in any other way.

III.

The decision misapprehends the effect of the judgment appointing petitioner Permanent Receiver. This event did not entail any transfer of credit between banking institutions.

This Court holds that ASCAP and Petitioner are banking institutions within the meaning of Exec. Order 8389 and that the judgment appointing Petitioner permanent receiver effected a transfer of credits so that prior to the judgment "ASCAP held a credit for AKM" and after

the judgment ASCAP held the credit "for the receiver". Therefore, it is held, the judgment of the State Court contravened §1A of the Executive Order. This argument was urged for the first time in this Court by the Custodian.

We believe that the term "banking institution" was never intended to apply to such as Petitioner or ASCAP.[2] However, even if such intention be assumed, the State Court's judgment did not involve a transfer of credit between banking institutions.

Petitioner, as receiver, became entitled to the ASCAP debt, by operation of law (§977-b, subd. 19). The judgment of the State Court which effected this result involved no act on the part of AKM or ASCAP. The judgment effected no change in ASCAP's books. It did not require ASCAP to debit AKM or credit the receiver; and ASCAP did not do so. In fact, ASCAP denied that it owed anything to either (1. R 68-9). How, then, can it be said that entry of the judgment of the State Court entailed a forbidden transfer of credits? Before any transfer of credit could occur, the receiver would have to reduce to judgment his suit against ASCAP. Then—and only then—would ASCAP be called upon to debit AKM's account and to credit that of Petitioner. This point was not reached in

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2 In its administration of the freezing controls, the Treasury Department consistently used the term "banking institution" only in its ordinary sense. Thus, it was applied to organizations having safe deposit boxes (Gen. Ruling 16, 9 F. R. 14669); making service charges for usual banking functions (Gen. License No. 2, 9 F. R. 2083); selling securities on stock exchanges for customers (Gen. License No. 4, 7 F. R. 7518); honoring checks, drafts, orders, etc. (Gen. License No. 7, 10 F. R. 6057; Gen. License No. 37, 7 F. R. 9862); collecting income on, and redeeming, securities held for customers (Gen. License No. 27, 7 F. R. 468; Gen. License No. 31, 6 F. R. 3349); issuing letters of credit, etc. (Gen. License No. 53, 9 F. R. 2084). See also Gen. License No. 60, 6 F. R. 3724; Gen. License No. 61, 6 F. R. 5804.

the proceedings and, accordingly, it cannot be said that a prohibited transfer of credits is involved.

However, even if the judgment appointing the receiver entailed a transfer of credit between banking institutions, it was such a transfer as had been expressly authorized by the Secretary of the Treasury. The receivership proceedings against AKM were in the nature of an attachment. *Matthews* v. *Matthews*, 247 N. Y. 32, 33. From the very inception of the freezing controls, attachment of frozen funds was authorized by the Treasury Department. It is not, and cannot be, denied that the Treasury ruled consistently that attachment suits were permitted by the freezing controls (our main brief pp. 50-3 and footnote 9; our reply brief p. 21, footnote 20). Under Sec. 1 of Exec. Order 8389, this ruling obviated the need for a license. The Treasury could authorize transactions in frozen funds "by means of regulations, rulings, instructions" as well as by "licenses". Since, as an action in the nature of attachment, the §977-b proceeding was authorized by the Treasury, it is immaterial whether the §977-b judgment entailed a transfer of credits. It was a permitted transfer—subject only to the restriction that payment of the credit was subject to license.

We believe that the decision is premised upon a transfer of credits when, in fact, none is involved. We believe, further, that there is no need to inquire into this question, since the §977-b proceeding was an attachment proceeding fully authorized by the Secretary of Treasury under the authority delegated to him by the President in Exec. Order 8389. We believe that the Court has misconceived the effect of the Executive Order upon the §977-b proceeding.

CONCLUSION

We are not unmindful of the importance of establishing the authority of the Executive in time of war. However, we are dealing here with a peacetime transaction solely. At the time of Petitioner's appointments—both temporary and permanent—there was no Alien Property Custodian and no effective Trading with the Enemy Act under which he could function, had that office then existed. What proper purpose of the Custodian can possibly be served by giving to the Custodian, as here, the authority to reach back into peacetime events and to destroy the peacetime State Court receivership of long standing? We believe that American creditors of AKM deserve a better plight than that in which the decision leaves them. The claims which they filed with the Receiver, cannot be satisfied in consequence of the decision here. Time limitations prevent them from claiming from the Custodian. Surely, such an unfortunate result can await a test of the state law by the State Courts.

Other cases, now *en route* to this Court will afford the Custodian the opportunity for the test which is possible here only by repudiating basic principles of both state and federal law which have been long established.

We earnestly urge this Honorable Court to direct a re-hearing of this cause, and, upon such re-hearing, to grant such relief as may be just and proper.

Respectfully submitted,

A. Walter Socolow,
Counsel for Petitioner.

Joseph M. Cohen,
On the Brief.

Certificate Pursuant to Rule 33

I, A. Walter Socolow, Counsel for the within petitioner, do hereby certify that the foregoing petition is presented in good faith and not for delay.

A. Walter Socolow,
Counsel for Petitioner.